86-1048

NO.

Supreme Court, U.S.
FILED
DEC 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October, 1986 Term

JEWEL M. COOPER

Petitioner

v.

DIAMOND M COMPANY

Respondnet

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Joseph L. Waitz
WAITZ & DOWNER
P. O. Box 7015
Houma, Louisiana 70361
Telephone: (504) 876-0870
Counsel for Petitioner

Henry D. McNamara
HAILEY, McNAMARA, HALL
LARMANN & PAPALE
P. O. Box 8288
Metairie, Louisiana 70011
Telephone: (504) 834-9252
Counsel for Defendant

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

25 pp

QUESTIONS PRESENTED

This writ of certiorari is sought pursuant to the adverse ruling of the Fifth Circuit Court of Appeals denying recovery to the plaintiff, Jewel Cooper, on the basis that 46 USC Section 763(a) should be given retrospective application instead of prospective application.

The issue presented for this Honorable Court to determine is 1) whether or not a newly enacted statute is to be given retrospective application, in the absence of any legislative intent to do so, when such application destroys a substantive right of the claimant and thus destroying the chance of any recovery from the tortfeasor; and 2) whether or not the district court was correct in summarily dismising the petitioner's suit when there was a factual dispute in existence as to whether or not the defendnat, Diamond M Company, was prejudiced by the maintenance of the petitioner's suit.

TABLE OF CONTENTS

Questions Presented.....i
Table of Contents.....ii
Table of Authorities.....iii
Statutes Cited in Petition.....1
Statement of the Case.....2
Argument.....4
APPENDIX A.....A-1

TABLE OF AUTHORITIES

CASES: Page

Adick v. S.H. Kress & Co. 398 U.S. 144, 190 S.Ct. 1598, 26 L.Ed. 142 (1970).....8

Clemons v. Dougherty County, Georgia, 684 F.2d 1365, 1368 (11th Cir. 1982).....9

Corpas v. Estelle, 605 F.2d 175 (5th Cir.).....5

Cox v. Schwerker, 684 F.2d 310 (1982).....5

Fordham v. Belcher Co., 710 F.2d 709 (11th Cir. 1983).....6,7,8

Friel v. Cessna Aircraft Co., 751 F.2d 1037 (1985).....6,8,

Gross v. Southern Railway Co., 414 F.2d 292, 297 (5th Cir. 1969).....9,10

Mobile Oil Corp. v. Dept. of Energy 728 F.2d 1477 (1983) cert. denied, 194 S.Ct. 3545.....4,9

Powell v. City of Key West, Florida, 434 F.2d 1975 (5th Cir. 1970).....10

U.S. V. Donally's Estate, 387 U.S. 286, 90 S.Ct. 1033, 25 L.ed. 2d 312 (1970).....5

JURISDICTION OF THE COURT

The jurisdiction of the United States Supreme Court is invoked pursuant to the Supreme Court rule 17(a) which authorizes a party to invoke the supervisory power of this Honorable Court when there are conflicting opinions between two different court of appeals circuits. This conflict has arisen between the 11th Circuit Court of Appeals and the 9th Circuit Court of Appeals. These decisions are in direct conflict with each other.

Judgment was entered into by the Eastern District Court of Louisiana dismissing the plaintiff's claim. Plaintiff then filed a motion of appeal to the Fifth Circuit Court of Appeals. Oral Argument was granted to the plaintiff and the Fifth Circuit reversed in part and remanded in part, handing down its decision on September 8, 1986. It is from this decision that the plaintiff applies for writs of certiorari to attempt to have her unseaworthiness claims relitigated. The Fifth Circuit affirmed the district court's decision that the unseaworthiness claim was barred under the newly enacted 46 USC Section 763(a).

STATUTES CITED IN PETITION

46 USCA Section 763(a)

"Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date of the cause of action accrued."

STATEMENT OF THE CASE

On November 14, 1984, the plaintiff, Jewel Cooper, filed her complaint for damages for personal injury in the United States District Court for the Eastern District of Louisiana, based upon an an accident which occurred on April 4, 1979. Named as defendant in the suit was Diamond M Company, a foreign corporation authorized to do business in the State of Louisiana. Plaintiff invoked the jurisdiction of the Court pursuant to the Jones Act, 46 U.S.C. Section 688, diversity of citizenship and under the General Maritime law with pendent and ancillary jurisdiction over claims under Louisiana Law arising out of the same cause of action. (Record, pp. 1-3)

Defendant filed his first Motion for Summary Judgment on March 1, 1984 and the plaintiff filed a Motion in Opposition to the Motion for Summary Judgment on March 16, 1984. (Record, pp. 9-19) This motion of the defendant was heard and, on June 7, 1984, the Court granted the Motion dismissing the plaintiff's Jnes Act claim. However, the Court granted the plaintiff an additional ten days to show excuse for the delay and what prejudice the defendant was caused because of this delay. (Record, pp. 20-22)

The plaintiff filed a Supplemental and Amending Complaint on June 9, 1984, alleging that no prejudice had actually resulted and the defendant filed a second Motion for Summary Judgment on July 23, 1984, attempting to dismiss the case under the doctrine of laches.

A pretrial conference which was initially set for hearing on August 15, 1984, was later rescheduled for August 28,1984. (Record, pp. 33-38) In preparation for the

scheduled conference, the defendant filed a Memorandum in Support of Motion for Summary Judgment, (Record, pp. 39-54) The defvendant filed a Supplemental and Amending Memorandum on August 24, 1984. (Record, pp. 65-66) After the pretrial conference was held on August 28, 1984, the Court denied the defendant's Motion for Summary Judgment and rescheduled trial and set another pretrial conference to be held on November 8, 1984. (Record, p. 72)

A second Supplemental Memorandum in Support of a Motion for Summary Judgment was filed on October 9, 1984, attempting to dismiss the plaintiff's case under the doctrine of laches and based on the theory that the delay was inexcusable and prejudicial to the defendant. (Record, pp. 83-87) The plaintiff filed a Memorandum attempting to show that the defendant was not prejudicial because of the delay on October 11, 1984. (Record, pp. 88-92)

A pretrial conference was held in preparation for trial and the Court ruled on the defendant's last Motion for Summary Judgment in favor of the defendant stating that the delay was unreasonable causing unnecessary prejudice to the defendant, Diamond M Company. (Record, pp. 93-110) The plaintiff filed a Motion for Rehearing on April 3, 1985, which was denied and he subsequently filed this pending appeal. (Record, pp. 113-120 and 268-276)

Subsequent to the dismissal by the District Court, Eastern District of Louisiana, the petitioner, Jewel Cooper, appealed the decision to the Fifth Circuit Court of Appeals. Pursuant to a Request for Oral Argument, same was granted and supplemental briefs were filed as required by the court. On appeal, the fifth circuit attempted to ascertain when the plaintiff's cause of action arose for her

maintenance and cure claim and also attempted to determine what statute of limitations would govern the accident in which the petitioner was involved.

After oral argument was had, the fifth circuit reversed the district court's dismissal as to her maintenance and cure claim as they determined that Ms. Cooper's right to compensation did not begin until April 27, 1983. The court, however, affirmed the district court's decision as far as the petitioner's right to claim for unseaworthiness is concerned. The court held that 46 USCA Secton 763(a) would be applied retrospectively to the petitioner's accident. the court's decision was based on the fact that such retrospective application would not destroy any of her substantive rights. The decision was handed down on September 8, 1986, and the petioner now seeks for writs of certiorari.

ARGUMENT

The main issue that the plaintiff petitioner raises in this request for writs is whether a federal statute, more specifically 46 USCA 763(a), should be given retrospective application when such application will destroy rights of the petitioners and thus leaving said petitioner in a state of destitute with virtually no where to turn. Prior to the enactment of 763(a), the statute of limitations governing maritime torts, such as unseaworthiness claims and claims under the general maritime law, were governed by the equitable doctrine of laches. Under this doctrine, the movant had the burden of establishing the unreasonableness in bringing this claim and the prejudicial that has resulted from this delay. *Mobile Oil Corp. v. Department of Energy* 728 F.2d. 1477 (1983) cert denied 194 S.Ct. 3545.

46 USCA 763 was repealed in October of 1980 and it was subsequently replaced with 4 USCA 763(a). Under 763(a), a general maritime tort was given a 3 year statute of limitations in which to file suit to recover damages occasioned by this tort. This 3 year statute of limitations in section 763(a) also covered claims of unseaworthiness. Section 763 (a) reads in its entirety as follows:

> "Unless otherwise specified by law a suit for recovery of damage for personal injury or death or both, arising out of a maritime tort shall not be maintained unless commenced within 3 years from the date the cause of action occurred."

The accident which forms the basis of this suit occurred on April 4, 1979 when the doctrine of laches was the governing statute of limitations. Subsequent to this accident, Section 763(a) was enacted, establishing the new statute of limitations period as 3 years for general maritime torts.

As a result of the enactment of section 763(a) the courts were faced with the decision of whether to grant retrospective application or prospective application to the statute. In the absence of clear congressional intent that a newly enactment statute is to be given retroactive application, it is the rule that only prospective belief will be granted *Cox v. Schwerker* 684 F.2d 310 (1982) *Corpus v. Estelle* 605 F.2d 175 (5th Circuit) cert denied, 445 U.S. 910,100 S.Ct. 1284, 63 L.Ed. 2d 605 (1979). Prospective application is generally presumed to avoid any unfairness that may be accompanied by the retrospective application of new enacted statutes. *U.S.V. Donnelly's Estate* 387

U.S. 286, 90 S.Ct. 1033, 25 L.Ed. 2d 312 (1970).

In determining whether retrospective application should be applied to the case at bar, the Fifth Circuit considered two recent decisions dealing with retrospective applications. The first decision was *Fordham v. Belcher Co.* 710 F.2d 709 (11th Circuit, 1983). In Fordham the court refused to apply Section 763(a) retrospectively to bar the plaintiff's claim because "section 763(a) contained no effective date and no suggestion that it should cut off claims which had accrued before its enactment." Furthermore, since there was not a clear unequivocal statement requiring retroactive application of this statute, the court found that only prospective application could be given. In making a determination that prospective application would be given to section 763(a) thus, allowed the plaintiff to proceed with his claim and enforce his substantive rights afforded him under the law.

The *Fordham case,* supra, clearly operates in favor of the plaintiff, Jewel Cooper. The problem, however, arose when the court was faced with *Friel v. Cessna Aircraft Co.* 751 F.2d 1037 (1985) It is the plaintiff, Jewel Cooper's contention that the court of appeals decision to affirm the dismissal of her suit was the result of an improper interpretation of the *Friel* case. In *Friel,* the court was also faced with a decision of whether or not 763(a) should be given retroactive application. The ninth circuit stated:

> "It is a rule of construction that statutes are ordinarily given prospective effect. But when a statute is addressed to remedies or procedures *and* does not otherwise alter substantive rights it will be applied to pending cases."

> "The purpose behind the rule of construction is clear. Non-retrospective application of a statute presents the assigning of a quality or effect to act or conduct which they did not have or did not contemplate when they were performed."

The court in *Friel* felt that no substantive rights had been altered as a result of the retroactive application because 763(a) was enacted before the plaintiff's claim prescribed under the old 2 year statute of limitations. Thus, the court reasoned that because 763(a) was enacted before the current 2 year statute of limitations had run the plaintiff's substantive rights would not be, in any way, altered by the retroactive application. This allowed the plaintiff to proceed with his claim to enforce his rights maintained under the law.

It is important to note at this time that the court, in writing its opinion, made specific reference to the *Fordham case,* supra, in Footnote #4 which reads:

> "Appellants point to several cases where the court refused to give Section 763(a) retrospective application. See *Fordham v. Belcher Towing Co.* 710 F.2d. 709, 710 (11th Cir. 1983). These cases dealt with whether 763(a) could be used to cut off actions which were otherwise viable under the doctrine of laches. *These are exactly the 'substantive rights' a court must look to in determining whether to apply a remedial statute retroactively.* In this case, appellants had acquired no such substantive rights." (emphasis added)

This clearly indicates that the court was under the impression that while no substantive rights were altered in *Friel*, supra, it did in fact feel that such rights were altered in *Fordham*, supra. Thus retroactive application was not warranted in *Fordham*, supra.

It is further pointed out that the *Fordham*, supra, decision more closely parallels that of the plaintiff, Jewel Cooper. Just as in *Fordham*, supra, Ms. Cooper sustained injury prior to the enactment of 763(a) and subsequent to her filing suit, 763(a) was enacted. The court in *Fordham*, wa of the opinion that to give retroactive application in this case would destroy serious substantive rights of the plaintiff. It is additionally important to note that in giving the retrospective application in *Friel*, supra, the plaintiff was still allowed to proceed, where as Ms. Cooper will be left destitute with virtually nowhere to turn.

Furthermore upon determining that retrospective application should not have been afforded to the situation of Ms. Cooper, it is additionally requested that this case be remanded to determine whether or not the granting of the Summary Judgment was correctly granted by the district court. The district court for the Eastern District of Louisiana granted a summary judgment where a serious factual dispute existed as to whether or not the defendants were prejudiced by the plaintiff's suit.

In order for a Motion for Summary Judgment to be granted, the party seeking the judgment bears the burden of demonstrating that there is no dispute as to any material fact in the case. *Adicks vs. S. H. Kress & Co,* 398 U.S. 144, 1980 S.Ct. 1598, 26 L.Ed.2d 142 (1970). In assessing whether the movant has met his burden, the Courts

should review the evidence and all factual inferences therefrom in the light mosst favorable to the party opposing the motion and all reasonable doubts about the facts should be resolved in favor of the non-movant. *Clemons v. Dougherty County, Georgia*, 684 F.2d 1365, 1368 (11th Cir., 1982).

When a doubt has been created as to the facts in question, the Court has no duty or function to try or decide factual issues. Its only duty is to determine whether or not there is an issue of fact to be tried, *Gross v. Southern Railway Company*, 414 F.2d 292, 297 (5th Cir., 1969).

The equitable doctrine of laches gives use to the possibilities of facts which may be in dispute, requiring such issues to be determined by the trier of fact. Under this doctrine, before the Court will sustain such a defense, the movant must show that there was an unreasonable delay in bringing the action and as a result of the delay the defendant is prejudiced. *Mobile Oil Corporation v. Department of Energy*, 728 F.2d 1477 (1983) Cert. denied 194 S.Ct. 3545.

In the present suit, the defendant moved for a Motion for Summary Judgment, attempting to dismiss the plaintiff's General Maritime claims of unseaworthiness and maintenance and cure based on the premise that they were unduly prejudiced because of the delay in bringing this claim. The defendants claimed they were prejudiced because the chief steward who supervised the plaintiff and operations of the kitchen where she worked had subsequently died. They also claim that the deceased supervisor was in charge of making necessary repairs on equipment in the kitchen such as the refrigeration unit which caused the

slip and fall. However, although he was supervisor of these types of repairs and Miss Cooper, the defendant failed to state that this supervisor, Burt Boeckl, was not even on the Barge when the accident occurred. Furthermore, he had not been on the Barge since the refrigeration unit malfunctioned and caused the water to be on the floor. It is hard to say that Mr. Boeckl's role in this matter and the subsequent loss of his testimony is prejudicial to the defendant in any way.

Additionally, this accident was reported to the proper authorities and supervisors, within the required time limits and Diamond M failed to conduct an investigation to determine the cause and/or causes of the accident. They even failed to take the necessary steps to correct defectsive condition of the floor which caused the accident. If there is any prejudice, it is very slight and caused simply by the defendant company's failure to investigate and determine the cause of the accident in anticipation of litigation.

In the case of *Powell v. City of Key West Florida*, 434 F.2d 1975 (5th Cir., 1970), the Court held that assertions as to whether the defendant was prejudiced created questions of act precluding summary judgment based on laches. In *Powell*, supra, the plaintiff filed suit more than six years after the accident in question occurred and the Court summarily dismissed the claim. On appeal, the Fifth Circuit held that the granting of the Motion for Summary Judgment was improper because the evidence offered by both sides presented an issue of fact to be decided.

Plaintiff respectfully submits that the case at bar also presents a reasonable dispute as to the facts. Under the holding of *Powell*, supra and *Gross*, supra, the only

body capable of resolving this factual dispute of whether or not there has been an unreasonable delay and whether or not the defendant is prejudiced, is the jury and it is requested that this Court remand the case on this point.

In light of this, the plaintiff, Jewel Cooper, respectfully requests that this time she is in a destitute state. She is permanently injured as a result of this accident and is incapable of future employment and she has and will incur in the future serious medical expenses that she will not be able to account for.

WAITZ & DOWNER

BY:_____

Joseph L. Waitz
423 Goode Street
P. O. Box 7015
Houma, Louisiana 70361
Telephone: (504) 876-0870
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Jewel M. Cooper,
PLAINTIFF—Appellant,
v.
Diamond M. Company,
Defendant-Appellee.

No.85-3299
OPINION

Filed September 8, 1986

Before: Thomas M. Reavley, Carolyn Dineen Randall and W. Eugene Davis, circuit Judges.

Opinion by Judge Carolyn Dineen Randall

Appeal from the United States District Court
for the Eastern District of Louisiana
George Arceneaux, Jr., District Judge, Presiding

SUMMARY

ADMIRALTY

Appeal from a district court's entry of summary judgment against appellant's unseaworthiness claim and her maintenance and cure claim. Affirmed in part , and reversed and remanded in part.

Appellant Jewel M. Cooper (Cooper) was employed as a steward by appellee Diamond M Company (Diamond M) when, on April 4, 1979, she sustained injuries on a Diamond M vessel. She slipped and fell in water that allegedly leaked from a refrigeration unit; the accident was not

witnessed. According to Cooper, Diamond M assured her that she would have a job as long as she wanted. Cooper continued to work for Diamond M "in pain" until April 27, 1983, receiving "compensation" of two hundred dollars per week from Diamond M from May 20, 1983, until September of 1983, when she was fired. On November 14, 1983, over four years after the accident, Cooper sued Diamond M for personal injury, alleging an unseaworthiness claim and a maintenance and cure claim. Diamond M maintained that her claims were barred either by laches or by the statute of limitations embodied in 46 U.S.C. §763a. Although holding that § 763a did not apply to bar the action, the district court found that laches did.

[1] Section 763a. enacted October 6, 1980, provides a three-year limitation's period for personal injury actions arising out of a maritime tort. Cooper's unseaworthiness action accrued prior to the statute's date of passage. [2] Nevertheless, a newly-created statute of limitation will not violate the Constitution by divesting a vested right if it allows a reasonable time for those affected by it to assert their rights. By the terms of § 763a. Congress indicated that three years would be a reasonable prescriptive period for asserting an unseaworthiness claim. Thus, a claim that accrued prior to the date of passage of § 763a remains viable only for three years after the date of passage. Because Cooper filed her suit more than three years after the passage of § 763a, her unseaworthiness claim is barred. [3] The maintenance and cure claim, however, was timely filed. In determining that this claim was barred by laches, the district court seemed to assume that the claim accrued on the date that Cooper slipped and fell in 1979. However, Cooper was not incapacitated by the fall, but instead continued to work, albeit "in pain," until April 27, 1983. Thus

her claim for maintenance and cure did not accrue until April 27, 1983, when she became "incapacitated to do a seaman's work."Using this latter date, her maintenance and cure claim was filed within the three-year statute of limitation embodied in § 763a.

OPINION

CAROYLN DINEEN RANDALL, Circuit Judge:

Appellant Jewel M. Cooper appeals from the district court's entry of summary judgment. We affirm in part, and reverse and remand in part.

Jewel M. Cooper was employed as a steward by appellee Diamond M Company. On April 4, 1979, Cooper sustained injuries on the Diamond M Vessel, Century, when she slipped and fell in water that had allegedly leaked from a refrigeration unit. The accident was not witnessed; another employee walked into the refrigeration unit to find Cooper already on the floor. Cooper explained that she had slipped and fallen, and reported the accident to the barge captain.

According to an affidavit filed by Cooper, Diamond M assured Cooper that she would have a job as long as she wanted. Cooper continued to work for Diamond M "in pain" until April 27, 1983, receiving "compensation" of two hundred dollars per week from Diamond M from May 20, 1983, until September of 1983, when she was fired.

On November 14, 1983, over four years after the accident, Cooper sued Diamond M for personal injury pursuant to the Jones Act, 46 U.S.C. § 688, and general maritime

law. Diamond M moved for summary judgment, claiming that Cooper's suit was untimely. The district court granted the motion as to the Jones Act claim, but denied it as to the unseaworthiness claim, allowing Cooper an additional ten days to amend her complaint to show that this latter claim was not barred by laches. Cooper amended her complaint to allege that her delay in filing suit was excusable and that the delay did not prejudice Diamond M. In a later amendment, Cooper added a maintenance and cure claim.

Diamond M again moved for summary judgment in July 1984, maintaining that Cooper's claim was barred either by laches or by the statute of limitations embodied in 46 U.S.C. § 763a. To support its claim of laches, Diamond M relied primarily on the affidavit of Kenneth A. Bradley, the claims manager of Diamond M. The affidavit stated that Cooper's supervisor, Hubert Boeckle, an important witness, had died on April 23, 1982. According to the affidavit, Boeckle would have had knowledge both of Cooper's post-accident condition and of the state of the equipment that had allegedly led to Cooper's accident.

In August 1984, the district court orally denied in part Diamond M's motion, ruling that 46 U.S.C. §763a, enacted October 6, 1980, did not apply to bar Cooper's claim. Turning to the laches issue, the court ruled that Cooper's delay in filing suit was not excusable. The court, however, gave Cooper additional time for discovery on the question of prejudice to Diamond M.

On March 7, 1985, Cooper and Diamond M filed a joint motion for summary judgment, Cooper had submitted no additional affidavits or depositions contradicting the evidence of prejudice contained in the Bradley

affidavit. Accordingly, on April 1, 1985, the district court granted summary judgment for Diamond M. ruling that Cooper had failed to carry her burden of showing that Diamond M had not been prejudiced by the delay in suit. The court also rejected Cooper's claim that the obligation to provide by the tenyear Louisiana prescriptive period for contractual claims rather than by laches. Cooper now appeals the district entry of summary juegment against her on the unseaworthiness and maintenance and cure claims.

II.

Summary judgment is appropriate if the full record discloses that there is no genuine isue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). On review, we apply the same test as does the district court. Because we find Cooper's unseaworthiness claim to be time-barred by 46 U.S.C. § 763a, we affirm the district court's entry of summary judgment against Cooper on this claim.[1] However, because we conclude that the district court did not apply the correct legal standard in determining when the maintenance and cure cause of action accured, we must reverse the district court's entry of summary judgment on the maintenance and cure claim.

---

[1] If we find the order of summary judgment correct, we can affirm the order althrough we disagree with the reasons given by the trial judge. *Shelly v. McAdory*, 781 F.2d 1053, 1054 (5th Cir. 1986). Moreover, our conclusion that Cooper's unseaworthiness claim is governed by § 763a rather than by the analogous Jones Act statute of liomitations and the doctrine of laches is not altered by our decision in *Albertson v. T.J. Stevenson & Co., Inc.*, 749 F.2d 223 (5th Cir. 1984). In *Albertson*, we invoked the doctrine of lachjes to bar a claim which accrued in 1969 and was sued in 1981; the applicability of § 763a, however, was not an issue before us in *Albertson*.

[1] Section 763a, enacted October 6, 1980, provides:

> Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued.

Only two circuit courts have addressed, with differing conclusions, the question whether § 763a should be applied to a cause of action, such as Cooper's unseaworthiness action, which accrued prior to the statute's date of passage. In *Fordham v. Belcher Towing Co.*, 710 F.2d 709 (11th Cir. 1983), the Eleventh Circuit refussed to apply § 763a to a negligence claim which had accrued in 1978, instead remanding the suit for determination of whether it was time-barred in accordance with the law of laches. In *Friel v. Cessna Aircraft Co.*, 751 F.2d 1037 (9th Cir. 1985), the Ninth Circuit did apply § 763a to ectend the period of limitations applicable to a cause of action which accrued in July 1980, three months prior to the passage of §763a, explaining: "when a statute is addressed to remedies or procedures and does not otherwise alter substantive rights, it will be applied to pending cases." 751 F.2d 1039.

[2] We find that § 763a applies to Cooper's unseaworthiness claim. A newly-created statute of limitation will not violate the Constitution by divesting a vested right if it allows a reasonable time for those affected by the Act to assert their rights. *Fust v. Arnar-Stone Laboratories, Inc.*, 736 F.2d 1098, 1100 (5th Cir. 1984). In the instant case, Congress by the very reasonable prescriptive period for aserting an unseaworthiness claim. We thus find that a claim which accrued prior to the date of passage of § 763a

remains viable for three years after the date of passage of that statute and thereafter succumbs to the absolute bar impressed by Congress. *See Fust,* 736 F.2d at 1100.[2] Because Cooper filed in November 1983, more than three years after the passage of § 763a, we find her unseaworthiness claim to be time-barred.[3]

We find that Cooper's maintenance and cure claim, however, was timely filed. "Maintenance and cure is disigned to provide a seaman with food and lodging when he becomes sich or injured in the ship's serivce; and it extends during the period when he is incapacitated to do a seaman's work and continues until he reaches maximum medical recovery." *Vaughan v. Atkinson,* 369 U.S. 527, 531 (1962). "Maintenance is a *per diem* living allowance, paid so long

---

[2] In addition, as the Ninth Circuit further observed in *Friel v. Cessna Aircraft Co.,* 751 F.2d 1037 (9th Cir. 1985), those cases refusing to give § 763a retrospective application "dealt with whether § 763a could be used to cut off actions which were otherwise viable under the doctrine of laches. "751 F.2d at 1039 n.4 (emphasis omitted). We agree with the district court that, in the absence of application of § 763a. Cooper cannot here sustain her burden of proff under laches to show reasonable delay and absence of prejudice. Thus, this is not a case which would be "otherwise viable under the doctrine of laches."

[3] Cooper's brief can be read to allege that Diamond M's promise to provide her with employment as long as she wished should either toll § 763a or estop Diamond M. from relying on § 763a. We do not agree. We find that Cooper's allegation is not sufficient to toll the statute. And while "[t]he equitable principle of estoppel prevents a defendant whose representations or other conduct have caused a plaintiff to delay filing suit until after the running of the statutory period from asserting that bar to the action," in order "to create an estoppel, the conduct of the defendnat must be so misleading as to cause the plaintiffs' failure to file suit." *Sanchez v. Loffland Bros Co.,* 626 F.2d 1228, 1231 (5th Cir. 1980), *cert. denied,* 452 U.S. 962 (1981). We do not find Diamond M's conduct so misleading as to have caused Cooper's delay in filing suit; thus, Diamond M can, as it did before the district court and does before us now, invoke the bar of § 763a.

as the seaman is outside the hospital and has not reached the point of 'maximum cure.' Cure involves the payment of therapeudic, medical and hospital expenses not otherwise furnished to the seaman, again, until the point of 'maximum cure.' " *Pelotta v. L & N Towing Co.*, 604 F.2d 396 (5th Cir. 1979). "The Supreme Court has long recognized the importance of these remedies ... and has declared that the doctrines of maintenance and cure are to be liberally construed to benefit the seaman." *Caufield v. AC & D Marine, Inc.* 633 F.2d 1129, 1132 (5th Cir. 1981). "When there are ambiguties or doubts, they are resolved in favor of the seaman." *Vaughn*, 369 U.S. at 532. Maintenance and cure are due without regard to negligence or unseaworthiness, and the claim for maintenance and cure cna be filed separately from whatsoever Jones Act or unseaworthiness claims are also available. *Pelotto*, 604 F.2d at 402; 1B *Benedict on Admiralty* § 43 at 4-10 (1985).

[3] In finding Cooper's maintenance and cure claim to be barred by laches, the district court seems to have assumed that the claim for maintenance and cure accrued on the date that Cooper slipped and fell: April 4, 1979. The record indicates, however, that Cooper was not incapacitated by this 1979 fall, but instead continued to work, albeit "in pain," until April 27, 1983. Cooper's cause 27, 1983, when she became "incapacitated to do a seaman's work."[4] *Vaughn*, 369 U.S. at 531. Seaman have always been accorded the right to bring suit, including serial suits, to collect

---

[4] The record reflects that Cooper received some form of "compensation"paymants from Diamond M from May through September, 1983, and that Diamond M, at least at one point, viewed these payments as maintenance and cure. Whether these payments in fact constituted maintenance and cure and the total amount of maintenance and cure due Cooper are of course issues of fact to be resolved by the district court upon remand.

maintenance and cure benefits as they become due, *Pelotta*, 604 F.2d at 401, and we cannot approve the district court's apparent reasoning that Cooper hsould have sought maintenance and cure *prior* to her incapacity.[5] As Cooper's cause of action accrued in April 1983, and as she brought suit in November 1983, amending of 1984, Cooper was well within the three year statute of limitation embodied in § 763a. The district court's conclusion that Cooper's maintenance and cure slaim was time-barred therefore cannot stand.

For the above reasons, the judgment of the district court is AFFIRMED in part and REVERSED in part and REMANDED.

---

[5] As the Supreme Court has recognized:"[t]he custom of providing maintenance and cure in kind and consurrently with its need has had the advantage of removing its benefits from danger of being wasted." *Farrell v. United States*, 336 U.S. 511, 519 (1949).